

No. 11-398

**In the
Supreme Court of the United States**

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit**

**REPLY BRIEF FOR STATE RESPONDENTS
ON THE ANTI-INJUNCTION ACT**

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QUESTION PRESENTED

The question presented is whether the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

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REPLY BRIEF

The federal government correctly concedes that the Anti-Injunction Act (AIA) does not bar the Court from considering the merits of Respondents' challenge to the individual mandate. But it erroneously resists multiple more straightforward avenues to that conclusion.

First, contrary to the federal government's assertions, the AIA is not an obstacle to reaching the merits for the simple reason that the AIA is not jurisdictional and is no longer pressed by any party. The federal government identifies nothing in the text of the statute that provides any clear indication that it is jurisdictional. And while it notes that the Court has sometimes labeled the AIA "jurisdictional," it fails to reconcile those passing references with the Court's repeated treatment of the AIA as a claims-processing rule subject to equitable exceptions and waiver. This Court has been more rigorous in its use of the jurisdictional label of late, and under rigorous analysis it is clear that the label fits neither the AIA nor the substance of this Court's AIA jurisprudence.

Second, even if the AIA were jurisdictional, it would pose no bar to the States' challenge. There is no merit to the federal government's assertion that the injury the mandate will cause the States is not legally cognizable, or its related contention that the States are not aggrieved by the mandate. Because the States here, like the State in *South Carolina v. Regan*, 465 U.S. 367 (1984), are injured, but not as taxpayers able to bring a refund action, they have no alternative avenue of relief. The AIA therefore does not apply and leave them without any remedy.

Moreover, the AIA and its generic reference to “any person” do not apply to States in the first place.

In all events, the AIA is inapplicable because Respondents challenge the mandate, not the penalty applicable to a subset of those who do not comply. The federal government’s attempt to blur the distinction between the two is irreconcilable with the text, structure, and purpose of the statute, not to mention the federal government’s long-term interest in having people obey federal law even in the absence of an enforceable penalty.

More fundamentally, the federal government’s concession that the penalty is not a tax for purposes of the AIA only underscores the implausibility of its continued insistence that the penalty is nonetheless a tax for constitutional purposes. Congress deliberately rejected the label and structure of a tax; the President assured the public that it was not a tax; the forced payments to insurance companies are not reflected on any federal government statement of revenues or expenditures; and the federal government itself insists the penalty is not a tax for all purposes. In the end, the mandate is not subject to the AIA, not because of some detail of labeling, but for the straightforward reason that it is not a tax for any purpose. It is something far different and far more problematic. It is an unprecedented mandate to purchase an unwanted product so that the federal government can pay for its new regulatory impositions on the seller without the accountability that comes with new taxes. Nothing in the AIA remotely prevents this Court from invalidating this unprecedented law.

ARGUMENT

I. The AIA Is Not Jurisdictional.

The federal government concedes that Respondents’ challenge to the individual mandate “is not barred by the [AIA]” and urges the Court to address the merits of their claims. Govt.’s Br. 5. But although no party invokes the AIA as a bar to reaching the merits, the federal government maintains this Court must address it anyway because it is jurisdictional. *Id.* The federal government is mistaken. The AIA has none of the “clear indications” that this Court requires to find a statute truly jurisdictional. Accordingly, it is no obstacle to reaching the merits of this important case. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

A. The Language, Purpose, and Context of the AIA Confirm that It Is Not Jurisdictional.

The plain text of the AIA—“no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,” 26 U.S.C. § 7421(a)—does not mention jurisdiction, much less speak in “clear” jurisdictional terms. The federal government attempts to demonstrate otherwise by focusing on the term “maintain,” but it overlooks the fact that that term is clearly directed to *litigants*: It addresses the kind of suits that may be brought “*in* any court *by* any person,” not the kind of suits that may be heard *by* any court. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010) (phrase “no civil action shall be instituted” non-jurisdictional because addressed

to litigants). Further, the AIA does not ultimately forbid any judicial challenge to collection of a tax; it merely delays such a suit pending payment or diverts it to administrative review. As this Court has explained, claims-processing procedures like the AIA, which seek to “promote the orderly process of litigation,” are non-judicial. *See Henderson*, 131 S. Ct. at 1203.

The purpose of the AIA also underscores its non-judicial nature. The AIA was intended to protect tax revenues by “requir[ing] that the legal right to the disputed sums be determined in a suit for refund.” *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). The AIA does not, therefore, protect the courts by cordoning off an entire subject-matter area as unfit for judicial review, but rather governs the way such litigation proceeds. As this Court put it, the AIA “was merely intended to require taxpayers to litigate their claims in a designated proceeding.” *Regan*, 465 U.S. at 374. And to the extent that the statute intends to protect the public fisc, as opposed to the courts, there is no reason the federal taxing authorities cannot waive it.

Given the lack of any clear indicia in the AIA that the statute is judicial, the federal government resorts to arguing that the Court should “presume” Congress has ratified a judicial reading of the AIA because “a long line of this Court’s decisions left undisturbed by Congress” has treated *other* related statutes as “judicial.” Govt.’s Br. 14 (internal quotation marks omitted). This transferred-acquiescence theory of statutory construction is not only legally dubious, but rests on a faulty premise. No such “long line” of cases exists.

The federal government relies on cases describing the similarly worded 26 U.S.C. § 7422(a) as “jurisdictional,” Govt.’s Br. 12–13, but it fails to mention that section 7422(a) was not the deciding factor in *any* of those cases. In each case, the taxpayer had satisfied section 7422(a)’s requirement to file a refund claim; the only question was whether that claim was timely under a statutory limitations period set forth in a *different* statute, 26 U.S.C. § 6511(a). *See United States v. Dalm*, 494 U.S. 596, 600 (1990); *United States v. Brockamp*, 519 U.S. 347, 349 (1997); *Comm’r of Internal Revenue v. Lundy*, 516 U.S. 235, 243 (1996). Whether the Court was correct in those cases to refer to section 6511(a)’s time-bar as jurisdictional, or whether that is just another instance of loose use of the term, is ultimately beside the point. This Court’s references to the status of section 6511(a)’s filing deadline shed absolutely no light on the AIA.

Whatever the status of section 6511(a), the filing requirement contained in section 7422(a), like the AIA, operates as a quintessential claims-processing rule: It “seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” *Henderson*, 131 S. Ct. at 1203. Notwithstanding loose language in the cases the federal government cites, section 7422(a)’s exhaustion mandate is precisely the sort of “threshold requirement[]” this Court has routinely treated as non-jurisdictional. *See Reed Elsevier*, 130 S. Ct. at 1246–47 & n.6.

**B. This Court’s Treatment of the AIA
Confirms that It Is Non-Jurisdictional.**

Once focus properly returns to cases interpreting the AIA itself, it is clear, as *Amicus* concedes, that there is no “long line” of cases treating the AIA as jurisdictional. *See Amicus* Br. 19 (construction of AIA has been “cyclical,” infused with “periods” in which Court rejected jurisdictional interpretation).

This Court’s recent decisions confirm that it is the substance of prior opinions, not the use of the label “jurisdictional,” that governs. And Congress, for its part, certainly could not have ratified a “jurisdictional” reading of the AIA when this Court consistently has treated the AIA as non-jurisdictional. *See Williams Packing*, 370 U.S. at 5–6 (equitable exception); *Regan*, 465 U.S. at 381 (remedial exception); *Helvering v. Davis*, 301 U.S. 619 (1937) (accepting waiver). Further, in a host of contexts this Court has reflected a “marked desire” to correct “less than meticulous” use of the term “jurisdictional”—rather than defer to loose references or “drive-by jurisdictional rulings” even where Congress has not objected. *See, e.g., Henderson*, 131 S. Ct. at 1202–07; *Reed Elsevier*, 130 S. Ct. at 1249; *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452–56 (2004).

The federal government attempts to dismiss as mere “statutory construction” this Court’s holding in *Williams Packing* that the AIA does not apply when the taxpayer has a strong case on the merits. Govt.’s Br. 16–17. That is to rewrite history. This Court

has been candid that *Williams Packing* represents a “judicially created” exception to, not an interpretation of, the AIA. See, e.g., *Regan* 465 U.S. at 372 (referencing “judicially-created” *Williams Packing* exception); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742 (1974) (examining whether AIA is “subject to judicially created exceptions other than the ... test announced in *Williams Packing*”). And the federal government does not explain what words in the seemingly categorical AIA (“no suit”) give rise to an exception for suits where the tax collector’s arguments are particularly weak.

More fundamentally, the federal government’s interpretation of *Williams Packing* is irreconcilable with the principle that *Congress* prescribes jurisdiction. If the AIA were truly jurisdictional, then Congress would have the last word and this Court would not be discussing whether to recognize or expand “judicially created exceptions.” To be sure, Congress could have clearly indicated that the AIA was “jurisdictional,” see, e.g., 28 U.S.C. § 1341, and also that jurisdiction nevertheless would exist where it was clear that the federal government would not “ultimately prevail,” *Williams Packing*, 370 U.S. at 7. But it did neither. The judicially created “extraordinary and exceptional circumstances” test thus confirms that the AIA is not truly jurisdictional in the sense of limiting “the courts’ statutory or constitutional power to adjudicate the case.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

Regan also underscores that conclusion by emphasizing that it is who sues and when—not the subject matter of the suit—that matters. *Regan* held that the AIA only “prohibited injunctions in the

context of a statutory scheme that provided an alternative remedy,” and “was merely intended to require taxpayers to litigate their claims in a designated proceeding.” *Regan*, 465 U.S. at 374. It thus confirms that the AIA is directed to litigants, not to the adjudicatory authority of courts, *i.e.*, jurisdiction. Indeed, a truly jurisdictional limit would admit of no equitable exception, even if a litigant was left wholly without remedy. *See Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010); *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Arbaugh*, 546 U.S. at 514; *Kontrick*, 540 U.S. at 452.

Moreover, the federal government effectively concedes that *Davis* and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), are irreconcilable with a jurisdictional reading of the AIA. The federal government acknowledges that this Court has “never expressly disavowed the result in *Davis* that enabled it to reach the merits,” Govt.’s Br. 20, but counsels ignoring it nonetheless.

Davis and *Sunshine Anthracite* are not so easily dismissed. They are consistent with this Court’s interpretation of the AIA as a claims-processing rule that permits equitable exceptions. What is more, they are precedential decisions that not even the federal government seriously proposes overruling. These and other cases squarely hold that the AIA is subject to forfeiture, waiver, and equitable exceptions. It is one thing to ignore loose language and dictum, but quite another to ignore the substantive results in cases like *Davis* and *Sunshine Anthracite*—decisions on the merits—that are irreconcilable with a jurisdictional reading of the AIA. *See Bowles*, 551

U.S. at 216 (“[I]f a limit is taken to be jurisdictional, waiver becomes impossible.”).

In the end, there is nothing to recommend reading the AIA as jurisdictional. The plain text of the statute speaks to litigants, not courts; its purpose is to process claims, not to limit the authority of courts; and the Court’s treatment of the statute as subject to waiver and judicially created exceptions is inconsistent with jurisdictional status. Because the AIA has no “clear indications” that it is truly jurisdictional, and is no longer pressed by any party, this Court may reach the merits.

II. The AIA Is No Obstacle To The States.

Even were the AIA jurisdictional, it would still not bar the States’ suit. First, there is no merit to the federal government’s assertion that the States lack standing to challenge or are not aggrieved by the individual mandate. The States are injured by the mandate but have no alternative means to challenge it. They thus fall squarely within the *Regan* exception. Moreover, the federal government does not come close to overcoming the strong presumption that the AIA’s generic reference to “any person” does not include the sovereign States.

A. The States Fall Squarely Within the *Regan* Exception.

1. The federal government cannot and does not dispute that the individual mandate will force millions of individuals to enroll in Medicaid even though they would not do so absent the mandate. *See States’ Br.* 25–26. Indeed, that is the whole point of the mandate’s application to Medicaid-eligible

individuals, who are largely exempt from the penalty. Nor does it dispute that enrolling such individuals will cost States hundreds of millions of dollars. See JA (Medicaid) 76 ¶¶ 17–18. It instead simply asserts that the States’ injury is not legally cognizable. See Govt.’s Br. 43. That assertion is baseless.

The federal government contends that the States cannot complain about costs generated by enrolling eligible individuals because the States elected to participate in Medicaid. But even assuming continued participation in Medicaid were voluntary, *but see* States’ Medicaid Br. 32–59, the federal government acknowledges that the States agreed only to “ensure that ‘all individuals *wishing* to’” enroll in Medicaid “‘have opportunity to do so.’” Govt.’s Br. 44 (quoting 42 U.S.C. § 1396a(a)(8); emphasis added). In other words, the States agreed to provide Medicaid to all eligible individuals *who want it*, not to provide Medicaid to all eligible individuals. Just like a company that agreed to provide a subsidized product to all who voluntarily want it, the States clearly have standing to challenge a law that makes that purchase/participation mandatory. Indeed, the mandate alters the States’ participation in, and costs of, Medicaid just as directly as if Congress had simply amended Medicaid to require States to enroll more individuals. Because the States unquestionably would have standing to challenge that kind of condition, they unquestionably have standing to challenge the mandate as well.

The federal government also argues that the States cannot challenge the mandate “as *parens patriae* ... on behalf of individuals to whom the provision applies.” Govt.’s Br. 45. But that argument

misconstrues the nature of the injury the States assert as an alternative basis for standing. They do not indirectly assert their citizens' interests; they directly assert their own sovereign interests. As this Court recently reiterated, "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States," *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), and thus injures *the States* distinctly from any injury to their residents. To the extent that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), deprives States of standing to seek redress for that injury, it should be overruled. See States' Br. 31–32. That said, the Court need not consider that question here given the States' clear standing to challenge the mandate's pecuniary impact on their participation in Medicaid.

2. The federal government also gains nothing from its invocation of prudential third-party standing principles because the States are seeking to redress their *own* legally cognizable injury—financial or alternatively sovereign—not the injury that the mandate causes individuals. "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied" *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 80–81 (1978).

Nor is there any heightened "standard[] for prudential standing under the Internal Revenue Code." Govt.'s Br. 44. Setting aside the fact that the States are challenging the mandate, not the penalty, see *infra*, Part III.A, which renders any concerns

about “orderly administration and enforcement of the [Tax] Code” beside the point, this Court has already recognized situations in which “a third party [is] permitted to challenge a tax or tax penalty or benefit applicable *to someone else* based on asserted indirect effects on the third party.” Govt.’s Br. 44. Indeed, the Court went out of its way in *Regan* to devise an exception to the AIA for just such situations and rejected the same arguments the federal government raises here in the process. *See Regan*, 465 U.S. at 380–81 (rejecting Secretary’s argument that State must rely on taxpayer to bring challenge).

Moreover, third-party standing concerns are particularly misplaced here because the individuals from whom the States’ injury flows have neither the incentive nor the ability to challenge the mandate. That injury is primarily a product of the mandate’s effect on Medicaid-eligible individuals, most of whom are not even subject to the penalty provision. The federal government is entirely silent as to how these individuals could challenge the mandate, let alone the penalty to which they are *not* subject, as the federal government goes to great lengths to pretend the mandate and penalty are one and the same. These individuals certainly do not have the option of defying the mandate, paying a penalty, and seeking a refund. Yet the whole theory of the AIA is that a refund action is the preferred mechanism for challenging a tax; and the whole theory of *Regan* is that aggrieved parties without a refund remedy are not barred by the AIA. Accordingly, the risk is even more acute here than in *Regan* that requiring the States to rely on “the mere possibility of persuading a third party to assert [their] claims” “would entirely deprive the

State[s] of any opportunity to obtain review.” *Id.* at 381. Nothing in prudential standing principles supports that inequitable result.

3. There is no question that the States “will be unable to utilize any statutory procedure to contest the constitutionality of” the mandate, as neither the mandate nor the penalty applies to them. *Id.* at 379. Accordingly, even assuming the AIA might bar some challenges to the mandate, it would not bar the States’ challenge. To the extent that the federal government suggests the States must demonstrate something more than standing to fall within the *Regan* exception, it is mistaken.

Regan did not devise some fact-based exception applicable only when a State “challenge[s] a statute that allegedly infringe[s] its power to borrow funds in violation of its Tenth Amendment rights.” Govt.’s Br. 50–51. It established a very clear rule that the AIA does not apply unless “Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf.” *Regan*, 465 U.S. at 381. As *Regan* explained, that rule is consistent with the basic purpose of the AIA, a statute enacted in conjunction with a refund provision that Congress assumed would provide an alternative forum for individuals to pay a tax under protest and challenge it later. Accordingly, the only thing necessary to bring a party within the ambit of *Regan* is a legally cognizable injury resulting from a tax that the party lacks an alternative forum to challenge.

B. States Are Not Persons Within the Meaning of the AIA.

The federal government offers no persuasive reason why the AIA’s generic reference to “any person” should be read to encompass the States. It is well settled that courts “must apply [the] longstanding interpretive presumption that ‘person’ does not include the sovereign,” which “may be disregarded *only* upon some affirmative showing of statutory intent to the contrary.” *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 780–81 (2000) (emphasis added). Like *Amicus*, the federal government makes no such showing.

First, neither *Ohio v. Helvering*, 292 U.S. 360 (1934), nor *Sims v. United States*, 359 U.S. 108 (1959), resolves the question whether the AIA applies to States. Govt.’s Br. 48. As the States have explained, *see* States’ Br. 38–41, nothing in either case even remotely supports the broad contention that *all* “internal revenue laws apply to States as ‘persons.’” Govt.’s Br. 48. They merely establish that such a law *can* be read to apply to States, but only if its “legislative environment” reveals Congress’ intent to reach States. *Sims*, 359 U.S. at 112; *see also Ohio*, 292 U.S. at 370 (“[w]hether the word ‘person’ ... includes a state ... depends upon the connection in which the word is found”); *cf. Vt. Agency*, 529 U.S. at 784 (interpreting one use of “person” in statute to include States but another use to exclude them).

Nor may the presumption against reading “person” to include States be dismissed by reasoning that “applying the AIA to the States does not upset the federal-state balance.” Govt.’s Br. 48. First, the

presumption is by no means limited to statutes that abrogate States' sovereign immunity. *But see* Govt.'s Br. 49. The Court has applied the presumption in a host of contexts—including contexts involving the United States rather than the States—"where the statute [would] impose[] a burden or limitation" on the sovereign. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (applying presumption to determine whether States covered by statute establishing burden of proof for land disputes with Indians); *see also United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (applying presumption to determine whether statute included United States); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (same).

Moreover, applying the AIA to States certainly would upset the federal-state balance. If the AIA applies to States, a State not only must pay a federal tax it believes to be unconstitutional but also must go through an administrative refund proceeding before it can challenge the tax in an Article III court. *See* 26 U.S.C. § 7422. It is one thing to include States within the ambit of a tax statute; it is quite another to relegate them to an administrative proceeding before they can vindicate their rights in an Article III court. The latter is a far greater affront to the dignity interest of States and surely implicates principles of federalism sufficiently to render it "incumbent upon the federal courts to be certain of Congress' intent before finding that" the AIA burdens States in that manner. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *cf. Fed. Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 n.11 (2002).

That the term “any person” was not added to the AIA until 1966 also in no way undermines the conclusion that Congress did not intend to reach States. As already explained, *see* States’ Br. 37–38, the relevant presumption does not arise because “person” is a unique term of art that presumptively *excludes* States. It arises because *no* generic legislative term should lightly be interpreted to *include* States. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (“States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” (internal quotation marks omitted)).

There is certainly nothing in the AIA’s original text to overcome the presumption—the statute simply stated that “no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.” Revenue Act of Mar. 2, 1867 § 10, 14 Stat. 471, 475. The addition of “by any person” underscores that it was directed at litigants all along, but is otherwise no more or less State-specific in its terms. Nor can the federal government identify any legislative history to support its argument since the AIA “apparently has no recorded legislative history.” *Bob Jones*, 416 U.S. at 736. And there is no reason to assume Congress would have been concerned with the procedures for States to challenge federal taxes given that it was not even clear to what extent Congress *could* tax the States when it enacted the AIA in 1867. *See, e.g., Collector v. Day*, 78 U.S. 113 (1870) (recognizing broad State immunity from federal taxes).

Indeed, the federal government offers no case in which the Court even considered applying the AIA to

a State (or, more aptly, an instrumentality of a State) until 70 years into the statute's existence. See *Allen v. Regents of Univ. Sys. of Ga.*, 304 U.S. 439 (1938). And even then (much like it did when the question next arose nearly 50 years later in *Regan*), the Court avoided the question by holding that “extraordinary circumstances” made application of the AIA inequitable. *Id.* at 448. The circumstances the Court identified underscore why the AIA does not apply to States at all—the Court concluded that requiring a State “to incur the expense and burden of ... prosecution of claim for refund of a tax” that might be unconstitutional is not an “adequate[]” remedy when a State is arguing that a tax impermissibly “burden[s] a state activity.” *Id.* at 448–49. There is no reason for the Court to read the AIA as requiring that result given the total absence of any evidence that Congress so intended.

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate.

A. The States Are Challenging the Mandate, Not the Penalty.

As the States have explained, *see* States’ Br. 43–48, whether the AIA applies to challenges to the penalty for violating the individual mandate is irrelevant because the States have brought suit for the purpose of invalidating the mandate, not “for the purpose of restraining the assessment or collection of” the penalty, 26 U.S.C. § 7421(a). The federal government’s arguments to the contrary are unavailing.

First, nothing in Respondents’ complaint suggests the purpose of their suit is to restrain the

penalty, rather than to invalidate the mandate. The complaint is replete with references to whether Congress has authority to impose a mandate “requiring and coercing citizens and residents of the Plaintiff States *to have healthcare coverage*.” JA 124 (emphasis added); *see also, e.g.*, JA 112 (“Congress lacks the constitutional authority to enact the individual mandate.”); *id.* (“None of Congress’s enumerated powers includes the authority to force every American to buy a good or service on the private market.”); JA 123 (“The Act is directed to a lack of, or failure to engage in, activity that is driven by the choices of individual Americans.”). And the primary relief sought is a “[d]eclar[ation] that the *individual mandate* exceeds Congress’s authority under Article I of the Constitution.” JA 124 (emphasis added); *see also* JA 125.¹

That Respondents are not seeking to restrain the penalty is further confirmed by the fact that neither the States nor Private Respondents will be subject to the penalty. Despite the federal government’s effort to equate the mandate with the penalty, the penalty’s validity is ultimately irrelevant to the States, as their injury stems from the mandate’s effect on individuals who will *comply* with the mandate by enrolling in Medicaid and are largely exempt from the penalty. *See supra*, Part II.A. The same is true as to Private Respondents—they are unaffected by the penalty because they fully intend to comply with the mandate

¹ Although the complaint includes an “alternative” claim alleging that if the penalty is a tax, it is not a constitutional one, JA 126, that *alternative* claim simply anticipated the federal government’s effort to conflate the mandate and penalty and its attempt to justify them under the tax power.

so long as it is the law. If their choice is to pay a premium and get insurance or pay a penalty and get nothing (not even the federal government's acknowledgement that they have complied with the mandate), they will choose the former. Respondents manifestly did not bring suit "for the purpose of restraining" a penalty that will not affect them, 26 U.S.C. § 7421(a).

Rather than attempt to demonstrate otherwise, the federal government maintains it is sufficient that invalidating the mandate "necessarily would restrain the assessment and collection of the" penalty, as the penalty would have no effect without the mandate. Govt.'s Br. 39. But that argument simply reads the "for the purpose of" language out of the AIA, by rendering the statute applicable to any suit that would have *the effect* of invalidating a tax.

Neither *Bob Jones* nor *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), supports rewriting the AIA in that manner. In both cases, the Court held the AIA applicable because it found that the purpose of the suits *was* to restrain taxes. *See Bob Jones*, 416 U.S. at 738 ("[Petitioner's] allegations leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner."); *Americans United*, 416 U.S. at 761 ("[R]espondent would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors."). That is because the tax-exempt status the parties were seeking to vindicate and the tax deductions that flowed from that status were two sides of the same coin. That is decidedly not the case here.

Respondents have a very powerful interest in invalidating the mandate wholly apart from the penalty because both the States and Private Respondents are injured by the mandate, not the penalty.

Moreover, the very different situations in *Bob Jones* and *Americans United* underscore why applying the AIA here would be contrary to its basic purpose. In those cases, applying the AIA made perfect sense because the challengers had alternative means through which they could pay under protest the taxes they sought to avoid and challenge the denial of tax-exempt status later. *See Bob Jones*, 416 U.S. at 746; *Americans United*, 416 U.S. at 761. Here, by contrast, applying the AIA would require Private Respondents to violate the mandate in order to challenge it because there is no avenue through which individuals may purchase the required insurance under protest. And applying the AIA to bar the States' claim would deprive the States of *any* avenue for challenging it. As this Court has already concluded, that is not how Congress intended the AIA to operate. *See Regan*, 465 U.S. at 373 (“[T]he Act was not intended to bar an action where ... Congress has not provided the plaintiff with an alternative *legal* way to challenge the validity of a tax.” (emphasis added)).

The federal government alternatively persists in its implausible contention that section 5000A “cannot meaningfully be divided into a discrete regulatory requirement and a companion penalty.” Govt.’s Br. 39 (internal quotation marks omitted). As the States have demonstrated elsewhere, *see* States’ Br. 43–48; States’ Minimum Coverage Br. 52–56, the federal

government's repeated attempts to read the individual mandate as no different from, and just a predicate for, the penalty provision are wholly irreconcilable with the text, structure, and purpose of the Act, not to mention the federal government's long-term interest in having law-abiding citizens. Congress itself meaningfully divided section 5000A into a discrete regulatory requirement and a companion penalty—section 5000A(a) imposes a free-standing mandate that nearly every individual “shall” maintain insurance, and section 5000A(b) imposes a “penalty” upon a subset of those who “fail[] to meet that requirement.” 26 U.S.C.A. § 5000A(a), (b). That the two are distinct is confirmed by the fact that the former applies more broadly than the latter, and payment of the latter does not eliminate the obligation imposed by the former. *Compare id.* § 5000A(d), *with id.* § 5000A(e). The federal government cannot rewrite the ACA by refusing to defend the statute that Congress actually enacted.

B. The ACA's Penalty Is Not a Tax.

The States agree with the federal government that, as a matter of statutory construction, the penalty is not a tax “for purposes of the AIA.” *See* Govt.'s Br. 20–35. But the penalty is also not subject to the AIA for the more basic reason that it is not a tax at all, for any purpose. That is as clear from its enacting history and its practical operation as it is from its text.

As the States have explained, *see* States' Br. 5–7, Congress considered numerous proposals to structure the statute as a tax but rejected them in favor of imposing a mandate to maintain insurance

accompanied by a “penalty” applicable to a subset of its violators. Congress’ findings accompanying the mandate confirm that it imposes a regulatory command to “achieve[] near-universal” insurance coverage, not a tax to raise revenue. *See* ACA § 1501(a)(2)(D). Moreover, Congress employed the label penalty, not tax, because the penalty operates as a penalty. “[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission.” *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). The federal government previously recognized this fundamental distinction. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 21–22 (1922) (Argument of Solicitor General) (“where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a penalty, and not a tax at all”). That is precisely what section 5000A(b) imposes—a punishment for a subset of those who violate the individual mandate. *See* States’ Minimum Coverage Br. 57–62.²

More fundamentally, the federal government gets things exactly backward by insisting that Congress’ labels and intentions are “highly relevant” for purposes of the AIA, but “irrelevant” for purposes of the Constitution. Govt.’s Br. 21. There is no great accountability interest served by ensuring that the penalty is not an assessable penalty under Chapter

² Indeed, just recently, the federal government once again confirmed that the penalty is not a tax. *See* Philip Klein, *OMB Director Undercuts Legal Case for Obamacare*, Wash. Examiner (Feb. 15, 2012), <http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/omb-director-undercuts-legal-case-obamacare/376561>.

68 or is exempt from the AIA. By contrast, there is a very powerful accountability interest in ensuring that the political branches cannot refuse to label or structure a provision as a tax, expressly disavow the notion that it is a tax, explicitly ground the provision in Congress' commerce power, but then turn around and defend that provision as an exercise of Congress' tax power. To make matters worse, the mandated premiums paid to insurance companies are entirely "off-budget" and not captured by any accounting of federal government revenues or expenditures. That cloaking effect is particularly troubling as the Nation struggles to address seemingly structural budget deficits. The accountability constraint on Congress' tax power is precisely why Congress chose to impose a penalty rather than a tax. The Court should not relieve Congress of the consequences of that politically convenient decision in construing the AIA or in resolving the ultimate constitutional questions in this case.

CONCLUSION

The Court should hold that the AIA does not bar the States' challenge to the individual mandate.

Respectfully submitted,

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